Supreme Court of the United States

OCTOBER TERM, 1947

No. 842 - 843

In the Matter

of

COMMUNITY GAS AND POWER COMPANY,
AMERICAN GAS AND POWER COMPANY.

JOHN VANNECK and PAUL C. MORAN, as Trustees under the Last Will and Testament of MARION P. BROOKMAN, deceased, and GABRIEL CAPLAN and others, on behalf of themselves and all debentureholders of AMERICAN GAS AND POWER COMPANY, similarly situated,

Petitioners,

against

SECURITIES AND EXCHANGE COMMISSION, COMMUNITY GAS AND POWER COMPANY, AMERICAN GAS AND POWER COMPANY and MINNEAPOLIS GAS LIGHT COMPANY,

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PERCIVAL E. JACKSON,
Counsel for Petitioners.

PERCIVAL E. JACKSON,
Attorney for Petitioners
John Vanneck and Paul C. Moran, as Trustees under the Last Will and Testament of Marion P. Brookman, Deceased.

McMANUS & ERNST,
Attorneys for Gabriel Caplan and other Debentureholders.

INDEX

CITATIONS

Court Decisions

Securities & Exchange Commission Decisions

Statutes

Texts

Supreme Court of the United States

OCTOBER TERM, 1947

No.

In the Matter

of

COMMUNITY GAS AND POWER COMPANY,
AMERICAN GAS AND POWER COMPANY.

JOHN VANNECK and PAUL C. MORAN, as Trustees under the Last Will and Testament of MARION P. BROOKMAN, deceased, and GABRIEL CAPLAN and others, on behalf of themselves and all debentureholders of AMERICAN GAS AND POWER COMPANY, similarly situated,

Petitioners,

against

SECURITIES AND EXCHANGE COMMISSION, COMMUNITY GAS AND POWER COMPANY, AMERICAN GAS AND POWER COMPANY and MINNEAPOLIS GAS LIGHT COMPANY,

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Hon. Fred M. Vinson, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petition of John Vanneck and Paul C. Moran, as Trustees under the Last Will and Testament of Marion P. Brookman, deceased, and Gabriel Caplan, et al., debentureholders of American Gas and Power Company, prays that Writs of Certiorari issue to review the judg-

ments of the United States Circuit Court of Appeals for the Third Circuit, entered in the above proceeding on May 3, 1948 (R. 212, 213), affirming an order of the District Court of the United States for the District of Delaware (R. 175a), approving and enforcing a plan of reorganization of Community Gas and Power Company and American Gas and Power Company, filed pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935. That plan had been approved by the Securities and Exchange Commission (R. 167a).

Opinions Below

The opinion of the Circuit Court of Appeals for the Third Circuit (R. 204-211) is not yet reported. The opinion of the District Judge (R. 169a) is reported in 71 F. Supp. 171. The findings and opinion of the Securities and Exchange Commission and the supplements thereto (R. 62a, 123a, 132a) are not yet reported.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended (28 U. S. C. A. Sec. 347(a)).

Statute Involved

The statute involved is the Public Utility Holding Company Act of 1935 (15 U. S. C. A. 79) and particularly Sections 11 and 26(c) thereof (15 U. S. C. A. 79k, z(w). The pertinent provisions are set forth herein where appropriate.

Statement of the Case

The order of the District Court appealed from undertook to enforce an amended plan filed under Section 11(e)

of the Public Utility Holding Company Act of 1935 (Holding Company Act) which had been filed by Community Gas and Power Company and American Gas and Power Company (American) and had been approved by the Securities and Exchange Commission (Commission). The 11(e) plan undertook to dissolve American which has outstanding $10,328,000 principal amount of secured debentures and 189,637.5 shares of common stock, in addition to certain certificates of indebtedness and common stock warrants.

The debentures are secured by collateral now held by the New York Trust Company, as Trustee, consisting of $3,411,870.12 in cash and all of the common stock of Minneapolis Gas Light Company (Minneapolis), the sole remaining subsidiary of American.

The amended 11(e) plan, as approved by the Commission, directs that:

(1) The Debenture Trustee release to Minneapolis for its corporate purposes the $3,411,870.12 of cash and surrender for cancellation all of the common stock of Minneapolis, the collateral held by the Debenture Trustee as security for the payment of the American debentures;

(2) Minneapolis be merged into American, which would change its name to Minneapolis and issue, inter alia, 1,090,382.16 shares of new common stock;

(3) The debentureholders receive 80.16% of the new common stock of Minneapolis in satisfaction and cancellation of their debentures, while the remaining 19.84% of new Minneapolis stock be distributed to the present common stock and warrant holders of American.

Thus, the lien of the debentureholders is destroyed; they are compelled to accept a portion of their collateral in full satisfaction of their claim and release the balance to the common stockholders of American.

Rulings of the Court Below

The District and Circuit Courts held the plan fair and equitable to all classes of security holders of American and, in so doing, overruled the objections of the debentureholders:

That the Commission lacked the power

(1) to satisfy the claims of secured debentureholders by payment other than in cash;

(2) to vitiate the pledge and deprive the debentureholders of their rights thereunder.

These contentions were, in turn, based upon the argument that

(a) Congress had not, expressly or impliedly, granted the Commission such powers under the terms of the Holding Company Act; that Congress has never granted such powers, except expressly; and that the general reorganization power does not embrace such powers; and

(b) the destruction of the pledge was not "necessary", as that term is used in Section 11(e) of the Holding Company Act.

Neither the District nor the Circuit Court, in their respective opinions, answered these contentions, but both Courts contented themselves with saying that

(a) The Commission's power to direct the satisfaction of unsecured debt by distribution in kind had been decided

by the Third Circuit in *In re Standard Gas and Electric Co.*, 151 F. 2d 326 (1945),* and

(b) That the principle so enunciated in the *Standard Gas* case had equal application to the satisfaction of secured debt.

Questions Presented

(1) Does the Holding Company Act grant power to the Commission to approve, and to the District Court to approve and enforce, a plan under Section 11(e), which divests the debentureholders of the cash and securities pledged for their benefit and compels them to accept in satisfaction of their secured claims only a portion of the pledged property?

(2) May debt, secured or unsecured, be satisfied by payment other than in cash under the provisions of the Holding Company Act?

(3) Is the destruction of the pledge "necessary" as that term is used in Section 11(e) of the Holding Company Act?

Reasons Relied On for Allowance of the Writs

The reasons relied on by petitioners for allowance of writs of certiorari by this Court are:

(1) A doctrine involving important questions of Federal law has been enunciated by the Court of Appeals for the

---

* This decision was followed by application to this Court for a writ of certiorari, and such writ was denied (327 U. S. 796, 66 S. Ct. 820 (1946)). However, before such denial, the proceeding had been remanded to the Commission by the District Court, and the plan had been changed by the proponent so as to pay the debt in cash (*Standard Gas & Elec. Co.*, Holding Co. Act Release No. 6435). The Commission brought these facts to the attention of this Court, thereby demonstrating, while the application for the writ was pending, that the issues thereunder would become moot.

Third Circuit, based upon and extending the ruling of that Court in the *Standard Gas* case.

The determination of these questions are of first impression and dispose of important legal issues, none of which has been, but should be, settled by this Court.

(2) The questions involved in the issues here presented require construction of the Holding Company Act and the intention of Congress thereunder, which are of grave import and of sweeping effect upon the status of public investors and public investments.

(3) The doctrine of the Third Circuit Court of Appeals here involved changes radically pre-existing judicial principles, including declarations of this Court, as to the construction of Congressional intent under the Bankruptcy Act, and reorganization statutes.

(4) The decision of the Third Circuit, if not reversed, will result in a radical change in the status of secured bondholders in reorganization proceedings before the Commission.

(5) The decision of the Third Circuit Court of Appeals affirms a radical departure by the Commission from pre-existing practice of satisfying secured debt by cash payment in reorganizations under the Holding Company Act.

ARGUMENT

(A) The Holding Company Act does not grant power to the Commission or the District Courts to divest the debentureholders of their lien and to compel secured creditors to accept only a portion of the collateral pledged for their benefit.

We recognize that this Court has held that the Holding Company Act permits the Commission to compel preferred

stockholders to accept stock in a reorganized company in satisfaction of their claims (*Otis & Co.* v. *Securities and Exchange Commission*, 323 U. S. 624).

Arguendo, we recognize that the Court of Appeals for the Third Circuit has held that unsecured creditors of a solvent public utility company may be compelled to accept portfolio stock in satisfaction of their claims. *In re Standard Gas and Electric Co.*, 151 F. 2d 326. But under no circumstances and in no case, except in the instant one, has any Court ever held that such treatment can be given to *secured* creditors. No Court has ever held that Congress granted the Commission, by the terms of the Holding Company Act, the power to void liens and to appropriate to general corporate purposes specific property mortgaged and pledged as security for debt. We believe no Court should ever do so.

The rationale of the *Otis* and *Standard Gas* decisions is that the power to reorganize under the Holding Company Act carries with it the power to pay preferred stockholders and unsecured creditors in kind. Here the question is whether the power of reorganization imports the unusual and extreme power to destroy liens and divert pledged property to other purposes.

The Circuit Court in the *Standard Gas* case pointed up the distinction, affirming the protected category of the lienholder (151 F. 2d 326, 330):

> "Persons who put money into a corporate enterprise do not, of course, all stand on the same plane in regard to their rights and duties. *The bondholder may have a specific lien on the corporate assets.* * * * *A noteholder, after all, has only a claim to be paid from corporate assets after security holders with specific liens are paid.*" (Italics ours.)

In the present plan, the secured debentureholders are required to give up their lien, receiving only 80% of the pledged securities and none of the pledged cash held by their trustee. The question now is whether the Commis-

sion has the power to ignore the vested property interests of the holders of secured debentures and to deal with them as though there were no pledge.

The issue cannot be decided as though the difference between payment in kind of an unsecured debt and the destruction of a pledge is a mere difference of degree, a distance that can be spanned by merely stretching the effect of the *Otis* and *Standard Gas* cases. It cannot be so decided because we are dealing here with a difference in kind and not merely a difference in degree. The difference in kind here involved is the legally significant difference between lien property interests and mere contract claims. This difference has long been recognized by our Courts as a fundamental concept of our law.

> *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, 55 S. Ct. 854;
> *Ginsberg* v. *Lindel,* 107 F. 2d 721;
> *In re Chicago, R. I. & P. Ry. Co.,* 90 F. 2d 312.

In the *Radford* case in holding the Frazier-Lemke Act unconstitutional this Court reiterated the principle (pp. 588-589):

> "It is true that the position of a secured creditor, who has rights in specific property, differs fundamentally from that of an unsecured creditor, who has none; and that the Frazier-Lemke Act is the first instance of an attempt, by a bankruptcy act, to abridge, solely in the interest of the mortgagor, a substantive right of the mortgagee in specific property held as security."

While the Third Circuit decided in the *Standard Gas* case that this Court's decision in the *Otis* case should be extended to support a power to satisfy unsecured creditors' claims by distribution in kind, the same reasoning does not apply to an extreme and disassociated power, the power to void liens.

There is not a single word in Section 11, or indeed in the entire Act, *expressly* granting the power the Commis-

sion has presumed to exercise. Nor can there be a valid claim that such a power was granted by implication. This Court has never rested such a drastic power upon mere implication and surmise. It is not lightly to be presumed that Congress sought to infringe on "very sacred rights." *Milwaukee Publishing Co.* v. *Burleson,* 255 U. S. 407, 438. This Court stated in *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 522:

> "* * * those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation."

Certainly, it cannot be said that because the power to void liens is not expressly denied, that drastic power is to be implied. In *In re Kerby-Dennis Co.,* 95 Fed. 116, the Court of Appeals for the Seventh Circuit said (p. 119):

> "It is also urged that since the bankruptcy act does not, as did a former bankruptcy act, expressly reserve liens of this character, therefore they are not entitled to protection. It is possible, perhaps, for Congress to interfere with vested rights, and to impair obligations of contracts; but such legislation would be opposed to equity and good conscience, and the intention of Congress so to enact cannot be presumed, in the absence of clear and unmistakable expression."

When we examine the nature of the interests of the holders of the secured debentures of American, the historical background of the pertinent legislation and the practical construction which has been given to the Act by the Commission itself, the same conclusion is reached.

1. The rights of a pledgee are well defined. The pledgee has a right of primary recourse to the pledged security for the satisfaction of his debt. He has a right of recourse to all of the security and not simply to a portion of it. He depends not on insolvency or reorganization for the vesting

of his rights; from the inception of the pledge he has a lien which he may retain until the debt secured is paid. He has the right to realize the fair market value of his security by judicial sale at public auction and the privilege of bidding for the property at such a sale so as to assure the application of the security to the satisfaction of his debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself.

Louisville Joint Stock Land Bank v. *Radford,* 295 U. S. 555;
Collins v. *Riggs,* 14 Wall. 491;
Jones, *"Collateral Securities and Pledges"* (Third Ed.), Sec. 372, p. 455.

Thus the basic test of value in discharging a mortgage or lien is market value, not predicted future earnings, for what is inherent in the pledge, and what constitutes its value to the pledgee, is the assurance that he may sell the collateral to realize a capital return which, at market, will be equivalent to the face of the obligation. Of this the debentureholders of American are deprived by the order of which we seek review since, not only is sale denied them, but they are compelled to take a portion of the collateral upon an estimated and hoped for future earnings basis, as though they were mere preferred stockholders or unsecured creditors.

2. Prior to the enactment of Sections 77 and 77B of the Bankruptcy Act in 1933 and 1934 and of Chapter X thereof in 1938, Congress never attempted to exercise or delegate power to affect liens. The Courts accordingly held that the failure to provide expressly that liens might be voided under the provisions of the Bankruptcy Act, by necessary implication preserved them from violation. *Straton* v. *New,* 283 U. S. 318, 332.

Reorganization, during that period, was confined to general equity proceedings and these were effected with due

regard for the rights of lien holders. *Kansas City Railway* v. *Central Union etc. Co.*, 271 U. S. 445; *Schmidtman* v. *Atlantic Phosphate and Oil Corp.*, 230 Fed. 769. In bankruptcy, even the remedy of sale free of liens was exercised under the limitation that the lien should attach to the proceeds. *Van Huffel* v. *Harkelrode*, 284 U. S. 225, 231. And in enforcing such acts as the Sherman Anti-Trust Law and the Hepburn Act, the Courts went no further than to apportion a mortgage lien where it was essential to do so to effectuate the policy of the Act. *Continental Insurance Co.* v. *U. S.*, 259 U. S. 156.

When, by Sections 77 and 77B of the Bankruptcy Act and Chapter X, the power to deal with liens was specifically conferred by Congress upon the bankruptcy and reorganization courts, the grant was not only express but was hedged about with numerous restrictive provisos for the protection of the lien holders. Consents of two-thirds of the lien holders as a class were necessary for confirmation of any plan affecting such lien; where less than such two-thirds consented, the creditors' right was protected by preserving their claim to either the specific property subject to the lien or to the proceeds of any sale thereof or by appraisal and payment in cash of the amount of their claims (Section 77, subdivisions (b)(5), (e), (o); Section 77B, subdivisions (b)(5), (e); Chapter X, Sections 179, 216(7)).

Yet, it is now asserted that in the Holding Company Act Congress by implication conferred this extreme power upon the Commission, without statutory restriction.

An examination of the intervening Holding Company Act, sandwiched, in point of time, between the cautiously-worded Sections 77 and 77B in 1933 and 1934, and the restraints of Chapter X in 1938, shows clearly that Congress intended to and did grant to the Commission only the general power to reorganize, denuded of any suspicion of intent to grant the extreme powers concerning liens delegated to the reorganization Courts during the thirties for

the first time, in consequence of and to alleviate grave and widespread corporate financial emergencies resulting from an unprecedented economic depression.

An examination of the Act itself for its grants of power discloses a complete lack of reference to utility pledges or mortgages.

In the preamble to the Act (Sec. 1) there is not a single reference to any abuse flowing from the issuance of secured indebtedness. In Section 2, the only reference to a bond is in subsection 16 which defines a security, an all-inclusive definition necessitated by the grant of jurisdiction in the later sections over the issuance and sale of utility securities.

Throughout the Act, there is not a single reference to secured debt, or the liens thereof, upon which can be based a claim that Congress intended to give the Commission jurisdiction to deal with them in manner other than in accord with their pledge.

Section 11(e) authorizes a plan "for the divestment of control, securities, or other assets, or for other action." Again, in referring to divestment, there is no mention of secured debt or lien.

We find nothing in the Act that grants or suggests this extraordinary power of denying vested property rights that were left undisturbed by Congress for almost a century and a half and were interfered with by Congress, under conditions of extreme urgency, expressly, conditionally and under definite safeguards, only in the bankruptcy reorganization statutes of the depression thirties.

Indeed, the single reference * to liens in the Act is contained in Section 26(c) which proclaims their sanctity and marks the intention of Congress to leave them undisturbed.

The Congressional debates are barren on the subject of debt securities in general with the exception of a statement by Congressman Eicher in which he referred to indebted-

* Aside from that in Section 7 relating to the issuance of new debt securities.

ness, but gave no indication that the Act contemplated the destruction of mortgage liens; on the contrary, he indicated what he thought had been extreme treatment for a lien holder when he said that "the courts have even gone so far as to permit the equitable apportionment among several properties of a general mortgage lien theretofore attaching to those properties as an indivisible whole, without accelerating the maturity date of the mortgage, if the segregation of those properties is necessary to conform to the policy of the Federal statutory law".* Of course, shifting of a lien from the whole to its parts no more imports destruction of the lien than the bankruptcy practice of selling free of a lien which attaches to the proceeds.

3. That there is present no "necessary implication" of the drastic power the Commission is assuming is also apparent from the practical interpretation given the Act by the Commission itself in a decade of its administration of the Act.

It has become axiomatic for Section 11(e) plans to provide for payment of both secured and unsecured creditors in cash.

We have found at least eighteen instances where secured and unsecured creditors were paid in cash.†

---

* H. R. Rep. No. 1318, 74th Cong., 1st Sess. (1935), pp. 49-50.

† *New York Trust Company* v. *Securities and Exchange Commission* (United Light & Power Company), 131 F. 2d 274 (C. C. A. 2nd, 1942), cert. denied 318 U. S. 786, rehearing denied 319 U. S. 781; *City National Bank & Trust Company* v. *Securities and Exchange Commission* (North American Light & Power Company), 134 F. 2d 65 (C. C. A. 7th, 1943); *In re North Continent Utilities Corp.*, 54 F. Supp. 527 (D. C. Del., 1944); *In re Consolidated Electric and Gas Co.*, 55 F. Supp. 211 (D. C. Del., 1944); *In re Laclede Gas Light Co.*, 57 F. Supp. 997 (D. C. E. D., Mo., 1944), aff'd 151 F. 2d 424 (C. C. A. 8th, 1945), cert. denied 327 U. S. 795; *In the Matter of Buffalo, Niagara and Eastern Power Corp.*, Holding Company Act Release No. 6083; *In the Matter of Pennsylvania Power & Light Co., National Power & Light Co., and Electric Bond & Share Co.*, Holding Company Act Release No. 6080; *In the Matter of Interstate Power Company*, Holding Com-

We have found none where they were not. *In re Jacksonville Gas Company,* 46 F. Supp. 852, may be claimed such an exception. There the secured creditors received 98.65% of the enterprise, the impairment of their rights was negligible and the issues here raised were not there presented, the secured creditors having not objected.

It may not be held that Congress, in enacting the Holding Company Act, delegated limitless powers of destruction to the Commission. Specifically that Act did not grant the Commission the power to void a pledge, to dilute the debentureholders' security and to give a substantial portion of it to the junior security holders.

(B) The Commission has no power to require satisfaction of debt by payment other than in cash.

In the foregoing discussion we have stated that even if the Commission has the power to direct satisfaction of unsecured debt securities by payment other than in cash, that does not embrace the power to void liens. But we do not concede—we challenge—the claim of Commission power to satisfy unsecured debt securities other than in cash. The assumption of that power in the *Standard Gas* case marked a radical departure from pre-existing Commission practice (see cases cit. ante, p. 13).

---

pany Act Release No. 7143; *In the Matter of Pennsylvania Edison Co., Pennsylvania Electric Co., Associated Electric Co.,* Holding Company Act Release No. 6723; *In the Matter of North Continent Utilities Corporation and Subsidiary Companies,* Holding Company Act Release No. 6667; *In the Matter of Consolidated Electric and Gas Co.,* Holding Company Act Release No. 5630; *In the Matter of Cities Service Power & Light Co.,* Holding Company Act Release No. 4944; *In the Matter of International Utilities Corp.,* Holding Company Act Release No. 4896, p. 7; *In the Matter of United Public Utilities Corp.,* Holding Company Act Release No. 4652; *In the Matter of Puget Sound Power & Light Co.,* Holding Company Act Releases Nos. 4174 and 4255; *In the Matter of Federal Water and Gas Corp.,* Holding Company Act Release No. 3937; *In the Matter of Great Lakes Utilities Company,* Holding Company Act Release No. 3419.

This Court held in *Otis & Co.* v. *S. E. C.* (323 U. S. 624) that in a dissolution under the Holding Company Act, stockholders of the corporation, preferred and common alike, may be compelled to accept new securities in full satisfaction of their stock interest in the enterprise. But this Court has never held that a creditor, secured or unsecured, may be compelled to accept distribution in kind in satisfaction of his claim.

Obviously, the status of a creditor of a solvent company is quite different from the relation that exists between classes of stockholders and the corporation. The stockholders are the owners of the enterprise and when it is to be dissolved may properly be required to accept their aliquot share of the assets of the enterprise in kind. Creditors stand in a different relationship; they are not partners. They are claimants against the corporation with or without lien against specific assets and with contract right to insist upon payment of their claim in cash.

There can be no doubt that, absent statutory authorization, a creditor has a right to demand cash for payment of his debt in reorganization (*Geddes* v. *Anaconda Mining Co.*, 254 U. S. 590, 41 S. Ct. 209, 65 L. Ed. 425; *Coriell* v. *Morris White, Inc.*, 2 Cir., 54 F. 2d 255; *In re Northampton Portland Cement Co.*, D. C., 185 F. 542; *In re Sale of Assets of First Nat. Bank of Florence*, D. C., 6 F. 2d 905; *In re J. B. & J. M. Cornell Co.*, D. C., 186 F. 859, 201 F. 381; *In re Prudential Outfitting Co.*, D. C., 250 F. 504). There can be no doubt that there is no specific or statutory authorization in the Holding Company Act empowering the Commission to deny creditors this right and to compel them to accept payment in kind in satisfaction of a claim calling for payment in cash. Whenever that power has been exercised by reorganization courts, the specific statutory provision is to be found and subject to certain safeguards.

The asserted power of the Commission to so affect the rights of creditors, where there is no statutory provision, where there are no safeguards, has never been passed upon

by this Court. It is an issue of great moment to creditors, secured and unsecured, of holding companies and requires the definitive adjudication of this Court. It is most vital that this Court determine whether the Commission has this drastic and unusual power.

(C) Assuming the Commission's power, the term "necessary" as employed in Section 11(e) of the Holding Company Act excludes a plan destroying liens, or paying debt other than in cash, where a plan not requiring destruction is feasible.

Section 11(e), so far as it is here relevant, provides:

> "If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, *necessary* to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as *appropriate* to effectuate the provisions of section 11 * * *." (Italics ours.)

It is to be noted that Section 11(e) uses the terms "necessary" when it speaks of the Commission's duties, and "appropriate" when it describes the District Court's function.

Obviously, such terms are not synonymous. True lower Courts have held that a plan need not be the best plan to be "necessary"; it suffices if it is "appropriate". (*In re North Continent Utilities Corp.*, D. C. Del., 54 F. Supp. 527, 530; *Commonwealth & Southern Corp.* v. *S. E. C.*, 3 Cir.,

134 F. 2d 747, 751; *In re Standard Gas & Electric Co.*, D. C. Del., 63 F. Supp. 876, 878.)

It may be that "appropriate" is the equivalent of "necessary" where abstractions are involved. But the obvious Congressional distinction between the terms may not be disregarded when to ignore the distinction results in unnecessary destruction of vested property rights.

The opinions of the Commission, the District Court and of the Circuit Court disclose that in the instant case the true basis for approval of the present plan rests upon the conclusion that the method employed was "appropriate" (R. 161a, 174a). We argued below that even by these standards, the plan was inappropriate, but for present purposes, it suffices to state that neither the Commission nor the Courts below have actually found the plan to be necessary as distinguished from appropriate and we submit that where, as here, there is involved a destruction of vested property rights, in the absence of a finding of real necessity, the plan should not be approved.

We recognize that as a general rule, this Court will not review the choice of method adopted by an administrative agency in carrying out the mandate of the statute. But where the method selected does such violence to firmly established principles of law, judicial disapproval of administrative edicts is essential.

CONCLUSION

WHEREFORE, it is respectfully submitted that this petition for writs of certiorari should be granted to review the judgments of the Court below.

Respectfully submitted,

PERCIVAL E. JACKSON,
Counsel for Petitioners.

PERCIVAL E. JACKSON,
Attorney for Petitioners
John Vanneck and Paul C. Moran, as Trustees under the Last Will and Testament of Marion P. Brookman, Deceased.

McMANUS & ERNST,
Attorneys for Gabriel Caplan and other Debentureholders.

INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1947

Nos. 842-843

JOHN VANNECK AND PAUL C. MORAN, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF MARION P. BROOKMAN, DECEASED, AND GABRIEL CAPLAN AND OTHERS, ON BEHALF OF THEMSELVES AND ALL DEBENTUREHOLDERS OF AMERICAN GAS AND POWER COMPANY, SIMILARLY SITUATED, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION, COMMUNITY GAS AND POWER COMPANY, AMERICAN GAS AND POWER COMPANY AND MINNEAPOLIS GAS LIGHT COMPANY

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION, COMMUNITY GAS AND POWER COMPANY, AMERICAN GAS AND POWER COMPANY, AND MINNEAPOLIS GAS LIGHT COMPANY, IN OPPOSITION.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 204-211), filed May 3, 1948, has not yet been

officially reported. The opinion of the District Court (R. 169a) is reported in 71 F. Supp. 171. The opinions and orders of the Commission (R. 62a, 123a, 132a) dated February 27, 1946, April 10, 1946, and January 14, 1947, not yet officially reported, are contained in Holding Company Act Releases Nos. 6436, 6541, and 7131.

JURISDICTION

The judgments of the Circuit Court of Appeals for the Third Circuit were entered on May 3, 1948 (R. 212, 213, 214). The petition for a writ of certiorari was filed on June 5, 1948. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347), made applicable by Section 25 of the Public Utility Holding Company Act of 1935 (15 U. S. C. 79y).

QUESTIONS PRESENTED

1. Does Section 11 (e) of the Public Utility Holding Company Act of 1935 authorize the approval and enforcement of a plan which compels creditors of a holding company, whose claims are secured primarily by a pledge of all of the common stock of an operating company, to accept in satisfaction of their claims shares of stock, in effect a portion of such pledged property, constituting the full and fair equivalent of their claims?

2. Should this Court, upon petitioners' allegation that another plan might be feasible, review

administrative and judicial findings that a reorganization plan is "necessary" to effectuate the provisions of Section 11 (b) of the Holding Company Act?

STATUTE INVOLVED

The applicable provisions of the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U.S.C. 79a, *et seq.* are set forth in Appendix A, *infra,* pp. 18-21.

STATEMENT

The judgments of the Circuit Court of Appeals sought to be reviewed (R. 212, 213, 214) affirm an order of the District Court (R. 175a) approving and enforcing a plan of Community Gas and Power Company ("Community") and American Gas and Power Company ("American"), previously approved by the Commission (R. 128a, 167a) under Section 11 (e) of the Act.

American is a public utility holding company registered under the Act. It is a subsidiary of Community, which is also a registered holding company. Prior to 1943 American had seven operating gas utility subsidiaries. On July 2, 1943, the Commission after extended hearings entered an order directing, *inter alia,* that Community and American take certain specified steps to comply with the integration and simplification provisions of Section 11 (b) of the Act (R. 59a). Pursuant to Section 11 (b) (1), American was directed to dispose of all of its operating subsidiaries except Minneapolis Gas Light Company ("Minneapolis").

Pursuant to Section 11 (b) (2), American was directed to change its existing capital structure, consisting of secured debentures, indebtedness owed to subsidiary companies, and common stock, into a capital structure consisting solely of a single class of common stock. The order also required, pursuant to Section 11 (b) (2), that Community be liquidated and dissolved. No appeal was taken from the Commission's order, and it is no longer subject to review.

At the present time Community's only substantial asset is 18.06% of the common stock of American. American's principal assets are all of the common stock of Minneapolis and approximately $3,410,000 in cash, representing the proceeds obtained from sales, pursuant to the Commission's 1943 order, of its equity interests in other operating subsidiaries. This cash together with the common stock of Minneapolis is held by the trustee under American's debenture agreement to secure American's debentures outstanding in the principal amount of $10,328,000, on which conditional interest of some $2,012,000 had accrued at July 31, 1945. In addition to the debentures, American has outstanding certificates of indebtedness in the amount of approximately $1,695,000 (substantially all held by Minneapolis), also 189,637½ shares of common stock, and warrants to purchase 40,000 shares of common stock at $5 per share (R. 80a-84a, 164a).

The amended plan filed by Community and American for compliance with the Commission's 1943 order provides for the liquidation and dissolution of Community and in substance for the merger of Minneapolis into American. In addition to its common stock, all owned by American, Minneapolis presently has outstanding $11,772,000 principal amount of first mortgage bonds and $2,256,700 par value of preferred stock. Under the plan, American will transfer approximately $3,330,000 to Minneapolis as of July 31, 1945, of which $1,615,000 is to be in payment of American's indebtedness to Minneapolis and the balance of $1,715,000 is to be a capital contribution. Upon receipt of this cash, Minneapolis will retire $2,772,000 of its first mortgage bonds. Minneapolis will then transfer all its assets and franchises to American, which will assume the remaining $9,000,000 of the bonded indebtedness of Minneapolis, will change its name to Minneapolis Gas Company, and will become a gas utility company.

The new company will issue, share for share, its preferred stock to the preferred stockholders of the old Minneapolis Gas Light Company. It will also issue its new common stock in the amount of 1,090,382.16 shares, of which American's present debenture holders will receive 80.16% and the holders of its present common stock and warrants 19.84%. In addition, debenture holders will receive, in cash, all unpaid fixed and conditional

interest accruing on the debentures from July 31, 1945, to the date of consummation (R. 132a-133a, 164a).

On February 27, 1946, the Commission issued an opinion requiring certain modifications as a condition to its approval of the plan (R. 62a). An amendment embodying these modifications was filed and on April 10, 1946, the Commission entered an order approving the plan (R. 128a) and thereupon made application to the District Court for the District of Delaware for its enforcement pursuant to Sections 11 (e) and 18 (f) of the Act. Consideration by the Court was postponed, however, and the Commission resumed its hearings on the plan when the City of Minneapolis, whose consent to the proposed transfer of franchises and assets by the old Minneapolis company to American was an express condition of the plan, withdrew the consent it had previously given.[1] At the reconvened hearings before the Commission an amendment to the plan proposing certain accounting changes was submitted. The record was brought up to date and the objections which were subsequently asserted in the District Court and the Circuit Court of Appeals were considered by the Commission. By

[1] The City's withdrawal of consent to the proposed transfer was based on its objection to a feature of the plan permitting, in lieu of an allocation of securities to American's secured debenture holders, a public offering of the new common stock and redemption of the debentures with the proceeds. Upon a statement by the company that no public offering of the securities is presently proposed, the City gave its consent to the proposed transfer conditioned upon no public offering being made.

supplemental findings and opinion and order dated January 14, 1947, the Commission approved the plan as amended (R. 132a, 167a).

The Commission found that the prospective earnings allocated to debenture holders under the plan will be very substantially in excess of their present total claim to fixed and contingent income. It noted that the funds to pay interest on the debentures now come solely from the Minneapolis stock and that this stock, together with the cash held by the debenture trustee which under the indenture could be used, subject to Commission approval, for the purchase of additional Minneapolis stock, constitute the sole financial base upon which the debentures rest, and concluded that the stock to be distributed to the debenture holders represents the equitable equivalent of their debentures. The District Court adopted the findings of fact and conclusions of law of the Commission, and entered an order approving the plan and directing its enforcement (R. 175a). Appeals were taken on behalf of certain individual debenture holders, by the debenture holders' committee and by the debenture trustee. The Circuit Court of Appeals found ample support for the conclusion that the plan is fair and equitable to the debenture holders, and necessary and appropriate to carry out the mandate of the Act, and affirmed the District Court order (R. 204, 212, 213, 214). Certiorari has been applied for on behalf of the individual debenture

holders who had appealed from the District Court decision.[2]

ARGUMENT

The plan for compliance with the standards of the Holding Company Act which this Court is now asked to review has been found to be fair and equitable to all concerned by the Commission and two courts. Indeed, petitioners do not now deny that the proposed allocation to the debenture holders is the fair and equitable equivalent of the rights surrendered by them. Nor do petitioners deny that Section 11 is a reorganization statute whereby it was intended to effectuate, through fair and equitable reorganizations, the requirements of Section 11 (b) for integration and simplification of holding company systems and correction of inequitable distribution of voting power. Recognizing, as they must, the long course of administrative and judicial precedents including this Court's decision in *Otis & Co.* v. *Securities & Exchange Commission,* 323 U. S. 624, which have construed and applied the reorganization provisions of the Act, petitioners are forced to argue that the present plan deals with matters outside the reach of

---

[2] The debenture trustee has notified the Commission and American of its decision not to participate in further litigation. The debenture committee has not applied for certiorari, but has requested and obtained company and Commission consent to the filing of a brief *amicus curiae* in the event certiorari is granted.

The City of Minneapolis, which appeared in the proceedings below, urges the importance of prompt disposition of the petition in a statement annexed hereto as Appendix B, *infra,* p. 22.

the reorganization process simply because it affects the rights of secured creditors. Specifically, they assert that as secured creditors they cannot be required to accept equitable payment in kind, but must be paid in cash (Pet. 6-16). A secondary argument is that assuming the instant plan is within the reach of the statute, nevertheless the Commission and the court below erred in finding it "necessary" to effectuate the purposes of Section 11 (b) in view of petitioners' claim that another type of plan might have been preferable. Although the question is one of importance, there is no suggestion of any conflict among the circuits, and since the decision below was clearly correct there is no need for further review in this Court.

1. Petitioners make separate but interrelated arguments to the effect that the broad reorganization provisions of Section 11 were not intended to affect (a) secured debt or (b) any form of debt security. Section 11 (b) however makes it the duty of the Commission both to require divestments limiting the scope of holding company operations, and also to require such changes in corporate structure and existence of companies in holding company systems as it finds necessary for the purpose of eliminating undue complexities and inequitable distribution of voting power. Sections 11 (d) and (e) expressly provide reorganization machinery to achieve the objectives of Section 11 (b). Petitioners would limit these broad provi-

sions so as to permit only such reorganizations as affect stockholders as distinguished from creditors, or at the most unsecured creditors as distinguished from secured creditors.

Petitioners' only source for this limiting construction is in decisions which in other contexts have construed particular legislative objectives as impairing, or not designed to reach, vested rights including those of creditors and lien holders. But these are cases where the legislation in question either did not afford an equitable equivalent for the rights surrendered, or was construed as not intended to effectuate reorganization at all. Under a statute which like the Holding Company Act indisputably provides for reorganizations in order, *inter alia,* to eliminate undue complexities in corporate structures, it would be unwarranted to read into it a limitation which prevents the reorganization process from reaching creditors' rights as well as those of other securityholders.[3] It will be noted that petitioners neither challenge nor could challenge at the present time the Commission's 1943 order under Section 11 (b) requiring the elimination of American's debt. Nevertheless they argue that this debt may be satisfied only in cash, and not by an allocation of assets constituting the equitable equivalent of the rights surrendered.

[3] *Cf. Consolidated Rock Products Co.* v. *duBois,* 312 U. S. 510, 528, where the Court pointed out that "requirements of feasibility of reorganization plans" will often result in bondholders receiving "inferior grades of securities" since this may be necessary "in the interests of simpler and more conservative capital structures".

In the *Otis* case, this Court indicated that the rights of creditors, like those of stockholders, are subject to adjustment under the Holding Company Act, stating: [4]

> Creditors' contracts also have been declared subject to equitable adjustment in corporate reorganizations so long as they receive 'full compensatory treatment' whether the reorganization is in bankruptcy (*Kansas City Terminal R. Co.* v. *Central Union Trust Co.*, 271 U. S. 445, 455; *Consolidated Rock Products Co.* v. *du Bois*, 312 U. S. 510, 528-30; *Group of Investors* v. *Chicago, M., St. P. & P. R. Co.*, 318 U. S. 523, 565-66) or in compliance with regulatory statutes. *Continental Ins. Co.* v. *United States*, 259 U. S. 156, 170-76. The full priority rule applies to reorganizations of solvent companies. *Consolidated Rock Products Co.* v. *du Bois*, 312 U. S. 510, 527.

The legislative history is replete with references to reorganization techniques, and to this Court's decision in *Continental Insurance Co.* v. *United States*, 259 U. S. 156, which disturbed the liens of first mortgage bondholders pursuant to a general statutory direction to break up illegal combinations.[5] *A fortiori* Congress intended to include in Section 11 the power to affect debt securities, like those of American, founded on equity securities in the holding company portfolio. The develop-

[4] 323 U. S. 624, 634, n. 14.

[5] See for example S. Rep. 621, 74th Cong., 1st Sess., pp. 13, 32, 33; H. Rep. 1318, 74th Cong., 1st Sess., pp. 49, 50, cited by this Court in the *Otis* case, 323 U. S. 624, 637, n. 19.

ment of the section through the several bills and amendments introduced in 1935 [6] leaves no doubt as to the Congressional intent to require reorganizations and to authorize distribution in kind as a favored method of reorganization. The risky and deceptive characteristics of collateral trust bonds or debentures of holding companies, secured by pledges of underlying common stocks, are pointed out in the studies and reports upon which the Act is expressly based.[7] Under Section 7 of the Act, the issuance of such securities is generally prohibited, throwing light on the kind of corporate complexities and impediments to fair and equitable distribution of voting power that are to be eliminated under Section 11.[8]

Thus, it is clear that in the reorganization of public utility holding companies Congress intended to equip the Commission and the courts with the power to require creditors, secured as well as unsecured, to accept an equitable distribution of the underlying securities in satisfaction of their original claims. Nothing in the nature of a pledge conflicts with this Congressional policy. As the court below put it (R. 209):

---

[6] This history is reviewed in *In re Standard Gas & Electric Co.*, 151 F. 2d 326, 329 (C. C. A. 3), certiorari denied, 327 U. S. 796.

[7] Public Utility Holding Company Act of 1935, Sec. 1 (b); Federal Trade Commission, Utility Corporations, Part 72A, pp. 154, 373-374, 378; S. Rep. 621, 74th Cong., 1st Sess., p. 59.

[8] See *American Power & Light Co.* v. *Securities & Exchange Commission*, 329 U. S. 90.

> But once it is conceded that a creditor in such a reorganization may be denied payment of his claim in cash and may be required instead to accept its equitable equivalent in securities in the continuing enterprise there is no basis for holding that the existence of a pledge of property as security for the creditor's claim gives him any different or greater rights. For the purpose of the pledge of property in such circumstances is merely to assure the payment of the creditor's claim. If the claim is lawfully satisfied by the delivery to the creditor of its equitable equivalent in other securities the function of the pledge has been fulfilled. A creditor has no right to pledged property as such. He has recourse to it only if necessary to secure for him the satisfaction of his claim.

2. The plan involved herein is in accord with previous administrative determinations of the Commission which have been upheld by lower courts. See *In re Standard Gas and Electric Co., supra,*[9]

---

[9] We do not urge this Court's denial of certiorari in the *Standard* case as itself a reason for denial of a writ in this case. We do refer, however, to the able and somewhat fuller discussion by the court below in that case of the issues raised by the present petition.

Petitioners state, at p. 5 of their petition, that in opposing the petition for certiorari in the *Standard* case the Commission indicated that the appeal was moot. The references in that brief to the events subsequent to the decision below were, however, directed solely to the merits of the petition, as is evident from the following statement appearing on page 7 of the Commission's brief:

> Petitioners in referring to the proceedings subsequent to the mandate of the Circuit Court of Appeals state that

and *In re Jacksonville Gas Co.*, 46 F. Supp. 852 (S. D. Fla.).[10]

The decisions cited in the petition which approved plans for payment of debt in cash[11] involve no conflict with the *Otis, Standard* and *Jacksonville* decisions that payment in kind may likewise be approved. Most of the cash plans involved satisfaction of debt claims, secured, as well as unsecured, otherwise than in accordance with the indenture terms.[12] The Act neither requires nor

---

"it may be argued by the Commission * * * that this petition is moot." (Pet. 8) We do not take that position. We believe, however, that the proceedings subsequent to the mandate illustrate the difficulties created by the drawn-out processes of litigation in the effectuation of a Section 11 (e) plan and, as such, may be relevant to this court's determination whether the writ of certiorari should be granted.

[10] The court approved a plan under Section 11 (e) of the Holding Company Act pursuant to which first mortgage bondholders were compensated in new bonds and common stock, and unsecured creditors in new common stock, of the reorganized company. The power of Commission and court to approve the plan was disputed by unsecured creditors, but not by bondholders.

[11] Petition pp. 13-14. One of the cases there cited, *Interstate Power Company,* Holding Company Act Release No. 7143 (1947); plan enforced *In re Interstate Power Co.*, 71 F. Supp. 164 (D. Del.) provided for alternative satisfaction of unsecured debt either in cash or in kind, dependent upon market conditions. A substitute plan subsequently approved and enforced, Holding Company Act Release No. 7955 (1947); plan enforced D. Del. No. 1003 (1948), provided for distribution in kind to the unsecured creditors.

[12] See *New York Trust Co.* v. *Securities & Exchange Commission,* 131 F. 2d 274 (C.C.A. 2), certiorari denied, 318 U. S. 786, rehearing denied, 319 U. S. 781; *In re Laclede Gas Light Co.*, 57 F. Supp. 997 (E. D. Mo.), affirmed *sub nom. Massachusetts Mutual Life Ins. Co.* v. *Securities and Exchange Commission,* 151 F. 2d 424 (C.C.A. 8), certiorari denied, 327 U. S. 795.

prohibits distribution in kind; the choice is left in the first instance to the company concerned, subject to Commission and court approval of the plan as fair and equitable to the persons affected, and necessary or appropriate to effectuate the provisions of Section 11.[13] Creditors may not compel the liquidation of a solvent holding company in order that they be paid in cash. As stated by the Court below (R. 208):

> . . . Securityholders who have invested in the enterprise whose capital structure violates the act may properly be required to accept the equitable equivalent of their investment in the form of new securities in the simplified structure of the continuing enterprise instead of the payments to which they would have been entitled if the enterprise had been discontinued and liquidated and its affairs wound up.

3. Petitioners' only basis for their contention that the plan is not necessary or appropriate is their claim that a plan providing for the payment of the claims of debenture holders in cash might have been feasible. The Commission in 1943, by a valid and subsisting order, required the elimination of American's debt. There is no question that the present plan will achieve compliance with Section 11 (b) (2) and with the Commission's 1943 order. It will eliminate the entire indebtedness of American; it will fairly and equitably distribute

---

[13] *Commonwealth & Southern Corp.* v. *Securities & Exchange Commission*, 134 F. 2d 747, 751 (C. C. A. 3).

voting power among its security holders, with the present debentureholders receiving about 80% of the voting stock in the new company; and in addition it will eliminate a useless corporate entity which represents an unnecessary expense to investors.

The Commission and the District Court found the plan necessary and appropriate to effectuate the provisions of Section 11 of the Act; the Circuit Court of Appeals found that the record furnishes adequate support for that conclusion. Even if an alternative plan might have been developed and approved, that would not render this plan unnecessary or inappropriate. The necessity of a particular plan in order to comply with the statutory mandate is largely a matter of practical expediency, as to which the judgment of the Commission is entitled to particular weight.[14]

---

[14] *American Power & Light Co.* v. *Securities and Exchange Commission, supra,* 329 U. S. 90, 112. Among the circumstances which influenced the management in proposing and the Commission and District Court in approving an allocation plan was the objection of the City of Minneapolis to a sale of the stock of the operating company.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

ROGER S. FOSTER,
Solicitor,
MYRON S. ISAACS,
Special Counsel, Division of Public Utilities,
WALTER H. GLASS,
Attorney,
Securities and Exchange Commission.
HUMES, SMITH & ANDREWS,
of Counsel.
NICHOLS, MULLIN & FARNAND,
FAEGRE & BENSON
of Counsel.

ALBRIDGE C. SMITH,
PRESCOTT R. ANDREWS,
IRWIN L. TAPPEN,
Attorneys for Community Gas and Power Company and American Gas and Power Company.

CHESTER L. NICHOLS,
GERALD T. MULLIN,
JOHN C. BENSON,
Attorneys for Minneapolis Gas Light Company.

Dated: June 10, 1948.

APPENDIX A

The pertinent provisions of the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C. 79a, *et seq.* are as follows:

Section 11 (b). It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: * * *

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. * * *

* * * *

(d) The Commission may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce compliance with any order issued under subsection (b). In any such proceeding, the court as a court of equity may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer under the direction of the court the assets so possessed. In any proceeding for the enforcement of an order of the Commission issued under subsection (b), the trustee with the approval of the court shall have power to dispose of any or all of such assets and, subject to such terms and conditions as the court may prescribe, may make such disposition in accordance with a fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing. Such reorganization plan may be proposed in the first instance by the Commission, or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization.

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or

companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

APPENDIX B

MINNEAPOLIS GAS LIGHT COMPANY

STATEMENT OF THE CITY OF MINNEAPOLIS CONCERNING CONTINUED DELAY IN CONSUMMATION OF THE PLAN OF SIMPLIFICATION AND INTEGRATION OF AMERICAN GAS AND POWER COMPANY

The City of Minneapolis is of the view that it would be in the best interests of the city and of the operating company that the application for the writ of certiorari be disposed of as promptly as possible.

For some time the regulatory powers of the City of Minneapolis over the Minneapolis Gas Light Company have been hampered, due to the fact that neither the City nor the Company could accurately forecast the earnings of Minneapolis Gas Light Company.

The franchise requires that the Company file, semi-annually, data disclosing past earnings accompanied by a forecast of future earnings, upon which bases a rate is set. The principal element of uncertainty in forecasting the rate is that the plan, among other things, changes the tax liability of Minneapolis Gas Light Company. This, in turn, prevents setting an accurate rate for the next 12-month period.

Another element of the plan changing the tax liability of the Company is the retirement of a portion of its outstanding bonds. Until the plan is consummated and this retirement effected, the Company has difficulty in properly accruing for taxes.

Presently the Company is forced to engage in bank borrowings to carry on its construction program, which might otherwise be financed by properly funding net additions to property account. This, in turn, has an adverse effect in arriving at a definite rate for the sale of gas within the City of Minneapolis.

The foregoing statement has been prepared for the purpose of indicating the disadvantage to which the city and its ratepayers is being and will be put through further delay.

CITY OF MINNEAPOLIS,
By JOHN F. BONNER,
City Attorney, and
(S.) CARSTEN L. JACOBSON,
Assistant City Attorney.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1948 702593 84